

6-3-2016

State v. Wellard Respondent's Brief Dckt. 43511

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 43511
Plaintiff-Respondent,)	
)	Bingham Co. Case No.
v.)	CR-2015-410
)	
ALAN WAYNE WELLARD,)	
)	
Defendant-Appellant.)	
_____)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BINGHAM**

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Alan Wayne Wellard appeals from his judgment of conviction for possession of methamphetamine, entered upon his conditional guilty plea. On appeal, he challenges the district court's denial of his suppression motion.

Statement Of The Facts And Course Of The Proceedings

While patrolling a well-known drug-related area on December 23, 2014, an officer with the Fort Hall Police pulled over a vehicle after noticing that it had an expired license tag. (R., p.158.) Wellard was a passenger in the vehicle. (Id.) Because neither the driver nor Wellard were tribal members, the officer contacted Bingham County for assistance, and Deputy Henrie was dispatched to the scene. (Id.)

Deputy Henrie contacted the driver and, after observing signs of impairment, questioned the driver about drug and alcohol use, and the driver admitted that he had been using heroine. (R., p.159.) The driver further consented to a search of his vehicle. (Id.) Deputy Henrie contacted Wellard and advised him that the driver had consented to a search of the vehicle. (Id.) The deputy asked Wellard to step out of the vehicle and, after asking if he had any weapons, asked if Wellard would consent to a pat down search. (Id.) Wellard consented. (Id.)

Before Deputy Henrie conducted the pat down, Wellard turned around and asked why the officer needed to pat him down. (Id.) Deputy Henrie explained that he would be searching inside the car and it was for his safety. (Id.) After responding "okay, I don't have any of that," Wellard turned back around for Deputy Henrie to pat him down. (R., pp.159-60.) During the subsequent pat down, Deputy Henrie discovered a pouch in

Wellard's pocket which, before the officer opened it, Wellard admitted contained scales. (See State's Ex. 3(b) at 8:35.) The scales had a crystal material on top of them, which Deputy Henrie believed to be methamphetamine. (R., p.160.)

After searching the vehicle, Deputy Henrie mirandized and arrested both the driver and Wellard. (Id.) Wellard informed the deputy that he had warrants out of Bannock County and that he currently had in his possession a pipe and some marijuana. (Id.) Later, while being transported to the county jail, Wellard also informed Deputy Henrie that he had a baggie of methamphetamine in his belt line at the front of his pants. (Id.) Deputy Henrie found and seized the contraband. (Id.)

The state charged Wellard with the felony of possession of methamphetamine, and misdemeanors of possession of marijuana and possession of paraphernalia. (R., pp.56-57.) Wellard filed a motion to suppress the evidence on the basis that the search was warrantless. (R., pp.58-59, 62-66.) The district court denied the motion, finding that Wellard consented to the search. (R., pp.156-68.)

Wellard entered into a plea agreement under which he pleaded guilty to the felony charge of possession of methamphetamine, and the state dismissed the misdemeanors. (R., pp.179-80; 6/16/2015 Tr., p.16, L.16 – p.17, L.21.) Though not actually part of the written plea agreement, the district court represented without objection that this was a conditional guilty plea, reserving the right to appeal the court's ruling on Wellard's suppression motion. (6/16/2015 Tr., p.16, Ls.3-10.) The district court entered judgment against Wellard and sentenced him to a unified term of six years with three years fixed, but retained jurisdiction. (R., pp.202-04.) Wellard filed a timely notice of appeal from the judgment. (R., pp.206-07.)

ISSUE

Wellard states the issue on appeal as:

Did the district court err when it denied Mr. Wellard's motion to suppress?

(Appellant's brief, p.6.)

The state rephrases the issue as:

Has Wellard failed to show error in the district court's denial of his suppression motion?

ARGUMENT

Wellard Has Failed To Show Error In The District Court's Denial Of His Motion To Suppress Evidence

A. Introduction

Determining that the warrantless search of Wellard's person was based on his voluntary consent, and that Wellard did not revoke that consent, the district court denied Wellard's suppression motion. (R., pp.156-68.) On appeal Wellard asserts that he revoked his consent by expressing hesitancy and, though he submitted to the search, subjectively not wanting to submit. (Appellant's brief, pp.7-9.) Application of the correct legal standards to the facts as found by the district court shows no error in the district court's analysis.

B. Standard Of Review

On review of a ruling on a motion to suppress, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence and exercises free review of the trial court's determination as to whether constitutional standards have been satisfied in light of the facts found. State v. Willoughby, 147 Idaho 482, 485-86, 211 P.3d 91, 94-95 (2009). At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw factual inferences is vested in the trial court. State v. Valdez-Molina, 127 Idaho 102, 106, 897 P.2d 993, 997 (1995).

C. Wellard Did Not Revoke His Voluntary Consent To The Search

The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV. “[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” Katz v. United States, 389 U.S. 347, 357 (1967). One exception to the warrant requirement is a search done pursuant to consent. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (citations omitted). The voluntariness of an individual’s consent is a question of fact to be determined based upon the totality of the circumstances. Id. at 227. As noted by the district court, when Deputy Henrie asked if Wellard consented to a pat down search, Wellard responded “yeah.” (R., pp.164-65; see also State’s Ex. 3(b) at 7:50.) That is sufficient to show that Wellard consented to the search.

On appeal Wellard concedes “that he initially consented to the search of his person.” (Appellant’s brief, p.8.) Wellard instead argues that he revoked that consent by “express[ing] hesitancy,” subjectively “not feel[ing] like he could outright refuse to allow the search,” and “believ[ing] he would be cited for resisting and obstructing if he did not comply at that point.” (Appellant’s brief, pp.8-9.) While consent is revocable, State v. Thorpe, 141 Idaho 151, 154, 106 P.3d 477, 480 (Ct. App. 2004), nothing in Wellard’s behavior indicates that he revoked his consent.

Far from a defendant’s subjective beliefs, the standard for determining the scope of consent is objective reasonableness, *i.e.*, “what would the typical reasonable person have understood by the exchange between the officer and the suspect.” Florida v. Jimeno, 500 U.S. 248, 251 (1991). To be objective, “[e]ffective withdrawal of consent requires unequivocal conduct, in the form of either an act, statement, or some

combination of the two, that is inconsistent with the consent to the search previously given.” Burton v. United States, 657 A.2d 741, 748 (D.C. Cir. 1994). This is because equivocal conduct can be construed in many different ways and, therefore, does not pass muster under an objective reasonableness test. Id.; see also United States v. Ross, 263 F.3d 844, 846 (8th Cir. 2001) (defendant’s impatience during the search of his car, questions how much longer the search would last, and statement that he needed to be on his way did not amount to an “unequivocal act or statement of withdrawal of consent.”); United States v. Brown, 884 F.2d 1309, 1311-12 (9th Cir. 1989) (having consented to a search of his luggage, defendant’s question to police officers at the airport: “Do I have to go?” did not withdraw his unambiguous statement of consent); United States v. Joseph, 892 F.2d 118, 122 (1989) (reaching into bag and saying “[d]o we have to do this here? ... I have underwear and things in the bag,” did not constitute effective withdrawal when defendant then accompanied officers to a more secluded area for the completion of the search).

Whatever Wellard’s subjective internal monologue, his objective external actions showed that he affirmed, not revoked, his consent. After he “hesitated and inquired as to why he had to be searched,” Wellard placed his hands on the car, turned fully toward the car, and submitted to the search. (R., p.165; see also State’s Ex. 1 at 35:00.) Then, before conducting the pat down, Deputy Henrie ensured that Wellard continued to consent by asking, “So you don’t mind?” (Id.; see also State’s Ex. 3(b) at 8:00.) Wellard gave no audible response, but again “turn[ed] back to fully face the car, with both hands touching the vehicle, and his arms extended.” (Id.)

The district court correctly determined that Wellard gave his consent to the search and did not revoke that consent. Wellard has failed to show any error in the district court's analysis. The district court's order denying Wellard's suppression motion should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order denying Wellard's suppression motion.

DATED this 3rd day of June, 2016.

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of June, 2016, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Russell J. Spencer
RUSSELL J. SPENCER
Deputy Attorney General

RJS/dd